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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Nothing in Respondents' Brief in Opposition alters the conclusion that this Court should grant certiorari, vacate the judgment and opinion of the Illinois Supreme Court, and remand for reconsideration in light of *Morales v. Trans World Airlines*, 112 S. Ct. 2031 (1992). Respondents' sole argument rests on a distinction between money damages and injunctive relief that this Court rejected more than 30 years ago and rejected again in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

I. RESPONDENTS' CONCESSION THAT THEIR CLAIMS "RELATE TO" THE SERVICES OF AN AIRLINE IS DISPOSITIVE.

Respondents have conceded that their statutory cause of action under the Illinois Consumer Fraud Act and their common law cause of action for breach of contract "relate to" American's "services" within the meaning of Section 105 of the Airline Deregulation Act, 49 U.S.C.

App. § 1305 ("Section 1305"), as interpreted in *Morales*. *See* Brief in Opposition at 9-10. The Illinois Supreme Court held that Section 1305 pre-empted injunctive remedies for these claims because—in respondents' words—an injunctive remedy "would require the court to regulate the manner in which American provided its passenger transportation *services*." *Id.* at 9 (emphasis added). Respondents did not file a cross-petition challenging that holding.[1] Indeed, they endorse the decision below as "carefully reasoned," and "fully consistent" with this Court's subsequent interpretation of Section 1305 in *Morales*. *Id.*[2]

Given respondents' concession that both of their claims "relate to" the services American offers frequent flyer program participants, it is clear that respondents' claims are pre-empted by Section 1305. Nevertheless, respondents attempt to defend the judgment below by arguing that Section 1305 does not pre-empt a damage remedy for their claims. *See* Brief in Opposition at 9. Specifically, respondents contend that the damages they seek "will not affect who is transported on American, when they are transported, where they are transported, or the circumstances under which they are transported" (Brief in Opposition at 11) and thus have too tenuous a connection to those services to warrant Section 1305 pre-emption.[3]

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[1] Respondents are thus precluded from arguing that their statutory and common law claims are outside the pre-emptive scope of Section 1305. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989); *Wise v. Lipscomb*, 437 U.S. 535, 547 (1978).

[2] Respondents suggest that American has conceded that the claims at issue do not relate to American's rates within the meaning of Section 1305. That is a misreading of America's position. *See* Petition for Certiorari at 2 ("The principal question in this case is whether [Section 1305] pre-empts state common law and statutory damage claims that relate to the *rates and services* offered to participants in an airline's frequent flyer program.") (emphasis added); *id.* at 8, n.9 ("Respondents claimed a state law right to purchase any seat . . . at particular AAdvantage fares (*i.e.*, 'fares')").

[3] Respondents note that AAdvantage mileage credits can be obtained through, and used for, "non-airline" services. Brief in Op-

The judgment below cannot be defended by such a transparent distinction. First, this Court's holding in *Morales* that airfare advertising restrictions "relate to" air carrier rates was expressly premised on the fact that, if allowed to stand, "these requirements would give consumers a cause of action . . . *for at least actual damages*," under state consumer protection statutes, and thereby "have the forbidden significant effect upon fares." 112 S. Ct. at 2039 (emphasis added). The Court thus concluded that *Morales* presented an issue "much like *Pilot Life* [*Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)] in which . . . a common-law tort and contract action *seeking damages*" was pre-empted by the identically worded ERISA pre-emption provision. *Id.* (emphasis added).

Second, respondents' argument ignores this Court's repeated holdings that damage awards are regulatory. In *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), this Court rejected an argument indistinguishable from the one respondents raise here. Justice Stevens' plurality opinion (for four Justices) specifically refused to treat injunctive claims differently from damage claims for pre-emption purposes, because state "regulation can be as effectively asserted through an award of damages as through some form of preventive relief." 112 S. Ct. at 2620 (quotation omitted). As the plurality observed, "common law damages actions . . . are premised on the existence of a legal duty" and "it is the essence of the common law to enforce" such duties through damage claims. *Id.* Justice Scalia's partial concurrence, joined by Justice Thomas, likewise refused to distinguish between injunctive claims and damage claims. *Id.* at 2632, 2634.

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position at 3 n.5. That is irrelevant, however, because this case has nothing to do with non-flight benefits. Respondents' claims, and the relief they seek, relate directly and exclusively to American's decision to impose blackout dates and capacity controls which affected air travel by AAdvantage members. *See, e.g.*, Wolens Complaint, Count I, ¶¶ 4, 13, App. 31a, 33a; Tucker Complaint, Count I, ¶¶ 2, 3, 6, App. 43a-44a.

Indeed, this issue was firmly settled long before *Cipollone*. In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court granted a petition specifically to consider whether a state court could "award damages arising out of peaceful union activity which it could not enjoin," 359 U.S. at 239, and held that it could not:

> Nor is it significant that California asserted its power to give damages rather than to enjoin. . . . Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

Id. at 246-47. *See also International Paper Co. v. Oullette*, 479 U.S. 481, 498 n.19 (1987).

This Court has repeatedly interpreted the virtually identical "relating to" language in the ERISA pre-emption provision, 29 U.S.C. § 514(a), to pre-empt damage claims as well as injunctive claims. In *Pilot Life*, for example, a unanimous Court held that damage claims for breach of contract and fraud fell within the scope of ERISA's "relating to" language. 481 U.S. at 47. In *Ingersoll-Rand Co. v. McClendon*, a unanimous Court similarly held that damage claims for breach of contract were pre-empted by ERISA. 111 S. Ct. 478, 482-83 (1990). Because "the relevant language of [Section 1305] is identical" to the ERISA pre-emption provision, *Morales*, 112 S. Ct. at 2037, Section 1305 should be given an identical interpretation.[4]

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[4] Respondents' argument is identical to the argument of the *dissent* in *Cipollone*. Respondents even go so far as to rely on the same cases relied on by the dissenting opinion. *Compare* Brief in Opposition at 13 n.12 *with Cipollone*, 112 S. Ct. at 2628 (Blackmun, J., dissenting in part).

Respondents cannot credibly maintain that claims for compensatory and punitive damages on behalf of a nationwide class will have no appreciable impact on an airline's conduct of its frequent flyer program. Respondents are seeking damages precisely *because* they challenge how AAdvantage members are transported on American, "when they are transported, where they are transported [and] the circumstances under which they are transported." *See* Brief in Opposition at 11. The damage claims respondents assert on behalf of millions of travelers plainly would alter American's *future* conduct because respondents' theory would subject American to liability for any program changes that affect how past mileage credits may be used for air travel in the future. As *Morales*, *Cipollone*, and *Garmon* recognize, Section 1305 precludes the use of state law damage claims to regulate indirectly what state law may not regulate directly. Since respondents' claims indisputably relate to American's services—as well as its rates—they are pre-empted in their entirety, regardless of the *remedy* respondents seek.

II. RESPONDENTS CANNOT DISTINGUISH *WEST* OR SHOW WHY THIS COURT SHOULD NOT VACATE THE DECISION BELOW, AS IT DID IN *WEST*.

Respondents' effort to distinguish *Northwest Airlines, Inc. v. West*, 112 S. Ct. 2932 (1992), is utterly unpersuasive. In *West*, as here, the plaintiffs asserted common law claims *for damages* for an alleged breach of an airline's contractual obligations to a passenger.[5] In both cases, the courts incorrectly held that damages sought under state laws of general application are not pre-empted by Section 1305. The arguments respondents press here did not warant denial of *certiorari* in *West*. This Court should

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[5] *See West v. Northwest Airlines, Inc.*, 923 F.2d 657, 658-59 (9th Cir. 1990).

thus take the same action it took in *West*—grant certiorari, vacate the decision, and remand for reconsideration in light of *Morales*.

Although respondents attempt to distinguish *West*, they completely ignore the Illinois Supreme Court's express adoption of what it characterized as the "majority view set forth in *West* . . . that 'section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services.'" App. 4a (quoting *West*). *Morales* squarely rejected the *West* court's approach (which the petitioner in *Morales* had also argued) as an "utterly irrational loophole" that "ignores the sweep of the 'relating to' language" of Section 1305. 112 S. Ct. at 2038. This Court unanimously concluded that *West* should be reconsidered in light of *Morales*. The Illinois Supreme Court's decision, which rested squarely on the discredited "view set forth in *West*," must likewise be vacated and reconsidered in light of *Morales*.

III. RESPONDENTS' CONTRACT CLAIMS, AS WELL AS THEIR CONSUMER FRAUD ACT CLAIMS, ARE PRE-EMPTED.

The decision below cannot be justified on the ground that respondents seek merely to "recover for the damages caused by American's breach of a contract, the terms of which it drafted and voluntarily accepted." Brief in Opposition at 18.

First, respondents carefully ignore the fact that they are not just asserting claims for breach of contract. Rather, like the petitioners in *Morales*, they have invoked a state consumer protection statute (the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121 1/2, Sec. 261 *et seq.*), to impose positive duties on an airline regarding allegedly deceptive advertising and marketing practices. Respondents can-

not persuasively claim they seek enforcement only of voluntarily assumed contractual obligations.[6]

Furthermore, Section 1305, which expressly pre-empts enforcement of "any law . . . relating to rates, routes, or services of any air carrier," encompasses breach of contract claims arising out of the relationship between American Airlines and AAdvantage members. This Court has repeatedly interpreted the identically-worded ERISA pre-emption provision, 29 U.S.C. § 514(a), to pre-empt breach of contract claims arising out of voluntarily assumed contractual obligations. *E.g. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 482-83. *See also Norfolk & Western Rwy. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1164 (1991) (Congress' use of the term "all law" in an immunity provision of the Interstate Commerce Act is broad enough to include laws that govern contractual obligations).

Permitting breach of contract actions like those alleged by respondents would thwart the specific objectives of Section 1305. The Program changes at issue, which respondents incorrectly describe as "retroactive," affect the air travel benefits for which mileage credits can be exchanged in the future. Respondents do not allege that American breached a clearly expressed contractual obligation not to make changes in frequent flyer benefits that affect unredeemed mileage credits. Respondents do not and cannot quote any contractual language prohibit-

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[6] Similarly, the Seventh Circuit in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990), held that the plaintiff's claim under the very same statute was an attempt to influence American's pricing policies and was therefore pre-empted by Section 1305. *Id.* at 754-55. Respondents' arguments here, if accepted, would continue to perpetuate the clear conflict between this case and the Seventh Circuit's decision on the same issue

ing such changes.[7] Rather, respondents argue that because American's explicit reservation of the right to modify the terms of its AAdvantage Program was not stated as clearly as state law purportedly requires, the reservation was somehow inadequate to preserve American's right to make changes that would affect the future use of unredeemed mileage credits. Respondents' contract claims, like their statutory claims, invoke state law to expand respondents' rights and restrict American's rights. Thus, as in *Morales*, it is clear that respondents seek to create "binding requirements" and "enforceable rights" between American and its AAdvantage members. Such a use of state law damage claims is pre-empted by Section 1305. *Morales*, 112 S. Ct. 2039-40.

As the Court has recognized in analogous contexts, a state-imposed common law duty of this type is, effectively, state regulation. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 484 ("It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same . . . conduct"); *Oullette*, 479 U.S. at 495 ("The inevitable result" of permitting common law claims "would be that . . . States could do indirectly what they could not do directly"); *Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) ("A system under which each State could, through its courts, impose . . . its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress"); *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 154-59 (1982).

The United States Department of Transportation ("DOT") has reached the identical conclusion with respect to state common law contract claims involving the rates and services offered frequent flyer participants.

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[7] Indeed, respondents admit that American retained the right not only to modify but also to *suspend* Program benefits, which plainly would affect the use of previously earned mileage credits. *See* Brief in Opposition at 4.

DOT has interpreted Section 1305 to pre-empt exactly the kinds of state common law contract claims at issue here:

> state contract laws of general applicability cannot authorize a determination of whether individual terms and conditions of a carrier's [frequent flyer] program are fair and reasonable, to the extent they relate to an airline's rates, routes, and services. Such state regulation is pre-empted under Section 105 [49 U.S.C. App. § 1305] of the Act.

DOT Order in Nos. 46280, 47539 (May 29, 1992) at 15; App. 83a.

Respondents' contention that Section 1305 pre-emption would leave consumers without a remedy for meritorious claims is simply wrong. In *Morales*, the petitioners advanced a similar argument, and this Court rejected it, noting that DOT retains authority to police deceptive practices involving airlines. 112 S. Ct. at 2040. DOT has recently rejected a claim that the airlines did not provide adequate advance notice to consumers of changes in their frequent flyer programs, including imposition of capacity restrictions and blackout dates. DOT Order, App. 78a. That is, in substance, what respondents claim here. Thus, if respondents are without a "remedy," it is only because the DOT has already determined that their claims lack merit.

The decision below is directly contrary to *Morales*, and premised on the discredited view set forth in *West v. Northwest Airlines, Inc.* It cannot be allowed to stand.

CONCLUSION

The petition should be granted and the opinion and judgment of the Illinois Supreme Court should be vacated and remanded. Alternatively, the case should be set for plenary review.

Respectfully submitted,

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